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## Military Officers and the Civil Office Ban

STEPHEN I. VLADECK<sup>†</sup>

President Trump's appointments of retired Gen. James Mattis as Secretary of Defense, retired Gen. John Kelly as Secretary of Homeland Security (and, more recently, White House Chief of Staff), and Lt. Gen. H.R. McMaster as National Security Advisor have reinvigorated the age-old debate over the appropriateness of current and former military officers serving in senior positions within the civilian government.<sup>1</sup> At the same time, although there has been significant popular commentary on these developments (and the specter of such a military-heavy inner circle), there has been surprisingly little legal analysis of the implications of such moves.<sup>2</sup>

Part of the reason for the paucity of legal analysis may be the lack of an obvious legal objection. To be sure, Congress had to approve Mattis's appointment (since Congress has generally required the Secretary of Defense to have been retired from active duty for at least seven years before taking the post).<sup>3</sup> And McMaster also needed to be reconfirmed by the Senate to be able to serve as National Security Advisor while retaining his three-star rank.<sup>4</sup> But once those technicalities were surmounted, discussion of legal objections all but disappeared—creating the impression that there's little (other than perhaps the Senate's advice-and-consent power) to prevent such militarization of senior civilian positions, perhaps even on a larger scale.

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<sup>†</sup> Professor of Law, University of Texas School of Law. This essay was derived from the "Future of the U.S. Constitution" symposium hosted by the American Constitution Society and the Indiana Law Journal at the Indiana University Maurer School of Law on April 14, 2017. My especial thanks to Dawn Johnsen for inviting me to participate in the conference and for her indefatigable energy and enthusiasm, to Jacy Rush and the editors of the *Indiana Law Journal* for their patience, and to Lucy Lyford for superlative research assistance. By way of full disclosure, I should note that I am counsel of record to the Petitioners in four of the five pending Supreme Court cases implicating the civil office ban (and discussed in detail herein)—*Abdirahman*, *Cox*, *Dalmazzi*, and *Ortiz*. For the record, the views presented in this essay are mine alone, and do not necessarily represent those of the Petitioners or their counsel.

1. See, e.g., Eliot A. Cohen, *The Downsides of John Kelly's Ascension*, ATLANTIC (July 31, 2017), <https://www.theatlantic.com/politics/archive/2017/07/the-downsides-of-john-kellys-ascension/535383> [<https://perma.cc/559H-KDPB>]; see also Steve Vladeck, *An Unconventional Test Case for Civilian Control of the Military*, LAWFARE (Feb. 27, 2017, 1:00 PM), <https://lawfareblog.com/unconventional-test-case-civilian-control-military> [<https://perma.cc/DT2E-XA69>].

2. For one of the few counterexamples, see KATHLEEN J. MCINNIS, CONG. RESEARCH SERV., R44725, STATUTORY RESTRICTIONS ON THE POSITION OF SECRETARY OF DEFENSE: ISSUES FOR CONGRESS (Jan. 5, 2017), <https://fas.org/sgp/crs/natsec/R44725.pdf> [<https://perma.cc/7FRU-M2GL>].

3. 10 U.S.C. § 113(a) (2012) ("A person may not be appointed as Secretary of Defense within seven years after relief from active duty as a commissioned officer of a regular component of an armed force."). Congress overrode this requirement for General Mattis in Pub. L. No. 115-2, § 1(a), 131 Stat. 6, 6 (2017) (to be codified at 10 U.S.C. § 113 note).

4. Jeremy Herb, *McMaster Needs Senate Confirmation to Keep 3 Stars*, POLITICO (Feb. 21, 2017), <http://www.politico.com/story/2017/02/mcmaster-defense-general-national-security-235244> [<https://perma.cc/2CQP-MS46>]; see also 10 U.S.C. § 601(a) (2012).

In the symposium Essay that follows, I aim to push back against this impression by introducing readers to an important—but little-known—constraint on the militarization of civilian government: the ban on active-duty military officers holding “civil office” codified today at 10 U.S.C. § 973(b).<sup>5</sup> Like its far-better-known contemporary, the Posse Comitatus Act of 1878,<sup>6</sup> the civil office ban was enacted after the Civil War as a means of limiting the ability of the military to exercise control over civilian matters. As the Ninth Circuit put it in 1975, its purpose was “to assure civilian preeminence in government, i.e., to prevent the military establishment from insinuating itself into the civil branch of government and thereby growing ‘paramount’ to it.”<sup>7</sup>

To that end, the ban as initially enacted prohibited active-duty military officers from holding any “civil office” within the federal government.<sup>8</sup> And although Congress has narrowed its scope somewhat over time, the ban remains in place today—and is the principal reason why, for example, only *retired* servicemembers can be named to the Cabinet (or most other government positions requiring Senate confirmation), and why active-duty military officers may not run for elective office (at any level of government).

Forests have been felled on the Posse Comitatus Act (which prohibits the use of the Army or Air Force for civilian law enforcement without specific congressional authorization), and its significance in protecting both civilian control of the military and the closely related but distinct principle of military noncontrol of civilians.<sup>9</sup> In contrast, outside of the government, surprisingly little has been written about the civil office ban—perhaps because it has been the subject of remarkably little controversy or litigation in its 147 years on the books. Indeed, until recently, the most detailed discussions of § 973(b) all could be found in internal government memoranda and legal opinions—which consistently read the provision capaciously. Simply put, the civil office ban just was not a source of political or legal controversy for most of its history.

As Part II demonstrates, that is no longer the case, thanks to a series of disputes that have emerged from the appointment of military officers to serve as judges on the U.S. Court of Military Commission Review (CMCR), the intermediate appeals court Congress created in 2006 in between the trial-level Guantánamo military commissions and the U.S. Court of Appeals for the D.C. Circuit.<sup>10</sup> After walking through the background that led to the current cases, Part II introduces the three appellate decisions construing § 973(b) to date—which have, between them, offered a series of less-than-convincing (and, in some cases, internally inconsistent) interpretations of

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5. 10 U.S.C. § 973(b) (2012).

6. Posse Comitatus Act, 18 U.S.C. § 1385 (2012) (“Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.”).

7. *Riddle v. Warner*, 522 F.2d 882, 884 (9th Cir. 1975) (italics omitted).

8. Act of July 15, 1870, ch. 294, § 18, 16 Stat. 315, 319.

9. For a comprehensive overview of the Act’s history and scope, see CHARLES DOYLE & JENNIFER K. ELSEA, CONG. RESEARCH SERV., R42659, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW (Aug. 16, 2012), <https://fas.org/sgp/crs/natsec/R42659.pdf>.

10. See 10 U.S.C.A. § 950f (West 2010 & Supp. 2017).

the ban.<sup>11</sup> Although the Supreme Court will have the last word in these cases,<sup>12</sup> Part II concludes by highlighting some of the potential implications if the lower courts' interpretations of the civil office ban to date are left intact.

Finally, Part III takes a step back from the current cases to reflect on the broader structural significance of the civil office ban in our constitutional system. Although we take the principle of civilian control of the military (and military noncontrol of civilians) for granted, it turns out that, as the civil office ban illustrates, many of its most significant manifestations are *statutory*, not constitutional. As Part III concludes, that understanding does not dilute the force or importance of the principle, but it *does* increase its vulnerability—to both unwarranted statutory interventions and unjustified judicial constructions. Especially at this moment in American history, then, the Essay suggests that discussions of the future of the U.S. Constitution ought to include the role of these kinds of statutes in protecting longstanding and fundamental norms such as those governing the relationship between civilian and military authority. And the statutes themselves should be interpreted broadly to vindicate their purpose—and, as importantly, amended begrudgingly.

#### I. THE HISTORY OF THE CIVIL OFFICE BAN

By far, the best history of the civil office ban can be found in a 1983 memorandum by the then head of the Office of Legal Counsel (OLC), Assistant Attorney General Ted Olson.<sup>13</sup> Olson's memo addressed whether the then-prevalent practice of assigning active-duty JAG lawyers to serve as "Special Assistant" U.S. Attorneys (SAUSAs) to prosecute civilian crimes committed on military bases in civilian federal courts was consistent with the extant version of the civil office ban.<sup>14</sup> As the 1983 OLC Memo explained, the ban was originally enacted as section 18 of the Act of July 15, 1870 (the annual Army appropriations act), and provided in its initial form that:

11. The three decisions in question are *United States v. Ortiz*, 76 M.J. 189 (C.A.A.F. 2017), *cert. granted*, No. 16-1423, 2017 WL 2340498 (U.S. Sept. 28, 2017); *United States v. Mohammad*, No. 17-002 (C.M.C.R. June 21, 2017); and *United States v. Al-Nashiri*, No. 14-001 (C.M.C.R. May 18, 2016); *see also* *United States v. Dalmazzi*, 76 M.J. 1 (C.A.A.F. 2016) (per curiam) (sidestepping the § 973(b) issue on procedural grounds), *cert. granted*, No. 16-961, 2017 WL 468379 (U.S. Sept. 28, 2017). A third petition—raising the same questions as *Dalmazzi*—was granted and consolidated with *Dalmazzi* and *Ortiz*. *See Cox v. United States*, No. 16-1017, 2017 WL 736132 (U.S. Sept. 28, 2017) (mem.). Two other petitions raising the questions presented in *Ortiz* are currently pending before the Court. *See Alexander v. United States*, No. 16-9536 (U.S. filed May 16, 2017); *Abdirahman v. United States*, No. 17-243 (U.S. filed July 31, 2017).

12. As of this writing, there are five pending cases raising whether the service of active-duty military officers as CMCR judges violates § 973(b): *Dalmazzi*, *Ortiz*, petitions consolidating subsequent cases that were decided based upon those two CAAF decisions (*Cox* and *Abdirahman*), and one outlier *Ortiz* trailer (*Alexander*).

13. Memorandum from Theodore B. Olson, Assistant Attorney Gen., Office of Legal Counsel, to William P. Tyson, Dir., Exec. Office for U.S. Attorneys (May 17, 1983) [hereinafter 1983 OLC Memo]. I obtained a copy of the memo, which had not previously been disclosed, through an April 2017 FOIA request. An electronic copy is available at <https://perma.cc/YLM8-KTR6>.

14. *See id.* at 1–7 (discussing the background).

[I]t shall not be lawful for any officer of the army of the United States on the active list to hold any civil office, whether by election or appointment, and any such officer accepting or exercising the functions of a civil office shall at once cease to be an officer of the army, and his commission shall be vacated thereby.<sup>15</sup>

“Like other provisions of [the same bill], it reflected the hostility toward the military establishment which pervaded the Forty-First Congress.”<sup>16</sup> In particular, the sponsor of the legislation—Military Affairs Committee Chairman John Alexander Logan—was concerned that:

[T]he detailing of military officers to fill civil positions will . . . soon, by precedent, establish the rule that all Army officers may be detailed to fill civil positions when a civil officer could not be detailed to fill a military position; hence the military will grow to be paramount to the civil, instead of the civil being paramount to the military.<sup>17</sup>

And although there was substantial debate over whether the prohibition would (and should) apply to *retired* officers, there was widespread support to “create an absolute bar to a military officer’s holding any appointive or elective office in the civil government.”<sup>18</sup> Senator Charles Sumner—one of the strongest proponents of excluding retirees—suggested that allowing *active-duty* officers to hold civil offices would be “in conflict with the fundamental principle of republican institutions.”<sup>19</sup> That sentiment was echoed (and repeated) by numerous colleagues.<sup>20</sup> Indeed, as OLC concluded in 1983, “[t]he debate in the Senate underscores the intended breadth of the prohibition”<sup>21</sup> with an especial focus on the term “civil office”:

The legislative history . . . indicates that the provision was intended to bar the appointment of regular military officers to any appointive positions in the civil government, irrespective of the importance of the office, the permanence of the appointment, or the likelihood of interference with the officer’s military duties. It contains no suggestion that there should be any distinctions drawn among categories of civil office for which military officers would thenceforth be ineligible. . . . Congress did not intend the applicability of its new prohibition to depend upon the importance of the office, or upon the identity of the civil appointing authority. An active duty military officer was to be barred from “any little office his neighbors might elect him to,” as well as from all levels of appointive office in the civil government, both state and federal.<sup>22</sup>

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15. Act of July 15, 1870, ch. 294, § 18, 16 Stat. 315, 319.

16. 1983 OLC Memo, *supra* note 13, at 9.

17. CONG. GLOBE, 41st Cong., 2d Sess. app. 150 (1870).

18. 1983 OLC Memo, *supra* note 13, at 10.

19. CONG. GLOBE, 41st Cong., 2d Sess. 3403 (1870).

20. See 1983 OLC Memo, *supra* note 13, at 11–13.

21. *Id.* at 13.

22. *Id.* at 15–16.

This understanding of the statute persisted up to—and through—the 1983 OLC Memo, a period during which the only amendments Congress made to the statute were technical and/or clarifying.<sup>23</sup> When Congress wanted to authorize specific military officers to hold civil offices, or to identify specific civil offices that could be occupied by active-duty officers, it so provided—in most cases, expressly. Otherwise, the statute generally prohibited active-duty officers from holding any civil office in the state or federal government, full stop. And as OLC concluded in 1983, a “civil office,” for purposes of the civil office ban, was any office “established by statute,” and the duties of which “involve the exercise of ‘some portion of the sovereign power.’”<sup>24</sup>

The breadth of the civil office ban is exactly what led OLC, in the 1983 memo, to conclude that it violated that prohibition for JAG lawyers to prosecute civilian criminal offenses as assigned SAUSAs. Indeed, after exhaustively recounting the history of the ban and prior administrative and judicial interpretations thereof, OLC made fairly quick work of the actual question presented, concluding that the position of SAUSA was one created by statute, and which clearly involved the exercise of the “sovereign power” of the United States.<sup>25</sup> After finding no reason to conclude that Congress had affirmatively ratified the practice, the memo concluded by recommending that legislation be pursued to remedy the identified problem—and affirmatively to authorize the service of military officers as SAUSAs.<sup>26</sup>

Congress responded quickly in the Department of Defense Authorization Act for 1984, enacting a series of amendments to the civil office ban in explicit response to the OLC Memo.<sup>27</sup> Among other things, the amendments narrowed the scope of prohibited civil offices to an office (1) “that is an elective office,”<sup>28</sup> (2) “that requires an appointment by the President by and with the advice and consent of the Senate,” or (3) “that is a position in the Executive Schedule under [5 U.S.C. §§ 5312–5317].”<sup>29</sup> The amendments went on specifically to *authorize* the holding of civil offices by active-duty servicemembers in cases not already prohibited, presumably with an eye

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23. For a summary of the pre-1983 revisions, see *id.* at 17–18 n.22.

24. See *id.* at 24. The most significant example remaining on the books today is 10 U.S.C.A. § 528 (West 2010 & Supp. 2017), which authorizes military officers to serve in senior positions within the intelligence community, including as Director and Deputy Director of the CIA. And until last December, 10 U.S.C.A. § 720 (West 2010 & Supp. 2017) authorized the appointment of an active-duty officer to serve as White House Chief of Staff—subject to Senate confirmation. That provision was (quietly) repealed in the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 502(g)(1), 130 Stat. 2000, 2103 (2016).

25. See 1983 OLC Memo, *supra* note 13, at 28–29.

26. See *id.* at 31–32.

27. See H.R. CONF. REP. NO. 98-352, at 233 (1983) (“The clarification was necessary to permit military personnel assigned to Judge Advocate General’s Corps duties to continue assisting attorneys in the Department of Justice with cases related to military installations and other military matters.”).

28. 10 U.S.C. § 973(b)(2)(A)(i) (2012).

29. *Id.* § 973(b)(2)(A)(ii)–(iii).

toward allowing JAG lawyers to serve as SAUSAs going forward.<sup>30</sup> And to immunize any legal claims arising from the pre-1983 practice, the amendments deleted the requirement that violators be terminated from the military and added a saving clause providing that “[n]othing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties.”<sup>31</sup> The civil office ban remains on the books in materially similar form today.

## II. THE CMCR LITIGATION

The current challenge to the civil office ban has its roots in the Supreme Court’s 2006 decision in *Hamdan v. Rumsfeld*, which invalidated military commissions created by President Bush to try noncitizen terrorism suspects detained at Guantánamo.<sup>32</sup> Congress responded to *Hamdan* by enacting the Military Commissions Act of 2006 (MCA),<sup>33</sup> which was designed to provide the statutory authorization for such military tribunals that the *Hamdan* Court had found lacking.

In addition to providing substantive authorization for the commissions, the MCA also set up an appellate structure—creating the Court of Military Commission Review and empowering it to hear appeals from final judgments (and some interlocutory appeals by the government) in cases arising out of the military commissions.<sup>34</sup> In many ways, the CMCR was modeled on the Courts of Criminal Appeals (CCAs) in the court-martial system—intermediate appeals courts that sit between the trial-level courts-martial and the Article I Court of Appeals for the Armed Forces (CAAF).<sup>35</sup>

To that end, with regard to staffing the CMCR with judges, Congress borrowed from the CCAs—authorizing the Secretary of Defense to “assign . . . appellate military judges” to the court who could be either active-duty military officers or civilians.<sup>36</sup> The Supreme Court had already held that it did not violate the Appointments Clause for the Secretary of Defense (rather than the President) to “assign” military officers to the CCAs because (1) they are inferior Executive Branch officers and (2) service as military judges was “germane” to their initial appointment as military officers.<sup>37</sup> Presumably, Congress figured it must follow that the Secretary could therefore assign already-serving CCA judges to exercise a similar function on the CMCR. But unlike the CCAs (from which appeals can be taken to CAAF), Congress provided (fatefully, as will shortly become clear) for appeals from the CMCR to go to the Article III D.C. Circuit.<sup>38</sup>

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30. *Id.* § 973(b)(2)(B).

31. *Id.* § 973(b)(5).

32. 548 U.S. 557 (2006).

33. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended in various sections of titles 10, 18, 28, and 42 of the U.S.C.).

34. See 10 U.S.C.A. § 950f (West 2010 & Supp. 2017).

35. See generally Stephen I. Vladeck, *Exceptional Courts and the Structure of American Military Justice*, in GUANTÁNAMO AND BEYOND: EXCEPTIONAL COURTS AND MILITARY COMMISSIONS IN COMPARATIVE PERSPECTIVE 163, 171–75 (Fionnuala Ní Aoláin & Oren Gross eds., 2013).

36. 10 U.S.C. § 950f(b)(2) (2012).

37. See *Weiss v. United States*, 510 U.S. 163, 196 (1994); see also *Edmond v. United States*, 520 U.S. 651, 658 (1997).

38. See 10 U.S.C.A. § 950g (West 2010 & Supp. 2017).

In 2009, the Obama administration introduced—and Congress passed—the Military Commissions Act of 2009, which reenacted the MCA with a series of tweaks.<sup>39</sup> Among other things, the 2009 MCA clarified that the CMCR is not under the control of the Secretary of Defense, but is instead a “court of record.”<sup>40</sup> And, perhaps because of concerns about the Secretary of Defense “assigning” civilians to serve as judges on the CMCR, the 2009 MCA also authorized the “appointment” of “additional judges” by the President, with the advice and consent of the Senate.<sup>41</sup> Thus, whereas the 2006 MCA contemplated only one mechanism for staffing the CMCR with judges, the 2009 MCA contemplated two: the § 950f(b)(2) “assignment” power, and the § 950f(b)(3) “appointment” power.<sup>42</sup>

The first interlocutory appeal by the government to reach the CMCR under the 2009 MCA was brought in the case of Abd al-Rahim al-Nashiri, who was charged for his role in, among other attacks, the 2000 bombing of the *USS Cole* and the 2002 bombing of the French tanker *M/V Limburg*. Nashiri objected that the CMCR’s assigned judges hearing the government’s appeal in his case were serving in violation of the Appointments Clause because, unlike their CCA brethren, CMCR judges were principal Executive Branch officers, and therefore had to be nominated by the President and confirmed by the Senate to their positions.<sup>43</sup>

Although the CMCR summarily rejected this argument,<sup>44</sup> the D.C. Circuit, on petition for a writ of mandamus, took it much more seriously. Indeed, even in denying the petition (on the ground that Nashiri’s right to relief was not “clear and indisputable”),<sup>45</sup> the Court of Appeals went out of its way to stress the seriousness of the Appointments Clause objection and to encourage the political branches to moot the issue:

Once this opinion issues, the President and the Senate could decide to put to rest any Appointments Clause questions regarding the CMCR’s military judges. They could do so by renominating and reconfirming the military judges to be *CMCR judges*. Taking these steps—whether or not they are constitutionally required—would answer any Appointments Clause challenge to the CMCR.<sup>46</sup>

The political branches took the not-so-subtle hint. In March 2016, President Obama formally nominated four of the already-assigned military judges on the

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39. See Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1801–1807, 123 Stat. 2574 (codified as amended in scattered sections of 10 U.S.C.).

40. 10 U.S.C.A. § 950f(a) (West 2010 & Supp. 2017).

41. 10 U.S.C. § 950f(b)(3) (2012).

42. 10 U.S.C. § 950f(b)(2)–(3) (2012).

43. See Steve Vladeck, *Al-Nashiri Argument Preview: The CMCR’s Appointments Clause Problem*, LAWFARE (Feb. 3, 2015, 8:17 AM), <https://www.lawfareblog.com/al-nashiri-argument-preview-cmcrcs-appointments-clause-problem> [https://perma.cc/H8KA-669E].

44. See *United States v. Al-Nashiri*, No. 14-001 (C.M.C.R. Oct. 6, 2014) (mem.).

45. See Steve Vladeck, *The D.C. Circuit’s Passive-Aggressive Approach to Military Commission Mandamus*, LAWFARE (July 31, 2017, 10:30 AM), <https://www.lawfareblog.com/dc-circuits-passive-aggressive-approach-military-commission-mandamus> [https://perma.cc/N2R4-ENUR].

46. *In re Al-Nashiri*, 791 F.3d 71, 86 (D.C. Cir. 2015) (emphasis in original).



CMCR to the same court under 10 U.S.C. § 950f(b)(3), and in April, the Senate confirmed them.<sup>47</sup> In theory, that step should have settled the matter—save for the civil office ban.

In May 2016, Nashiri renewed his objection to the service of military officers as CMCR judges, this time arguing that their *appointment* to the CMCR triggered § 973(b)'s civil office ban—and that if it didn't, the service of active-duty servicemembers in a position with tenure protection violated the Commander-in-Chief Clause. The CMCR gave both arguments the back of its hand, dismissing the former on the ground that CMCR judges do not hold a “civil office” because they exercise a “classic military function.”<sup>48</sup>

As noted above, though, the typical remedy for a violation of the civil office ban historically was not the officer's disqualification from the unauthorized civil office, but rather the termination of his or her military service, *nunc pro tunc*. In other words, if the appointment of active-duty military officers to the CMCR did indeed violate the civil office ban, that should not have called into question their continuing service on the CMCR, but rather their official actions taken *as* military officers—in this case, as judges on the Army and Air Force CCAs.<sup>49</sup>

So it was that, shortly after the CMCR's decision in *Nashiri*, court-martialed servicemembers began challenging CCA decisions in which one (or more) of the judges who heard their appeals was also serving on the CMCR, arguing that those judges were no longer military officers and were therefore disqualified from sitting on their CCA panels. After an awkward false start,<sup>50</sup> CAAF finally confronted the issue in *United States v. Ortiz*.<sup>51</sup>

Writing for a unanimous court, Judge Stucky focused his analysis on the 1983 amendments to § 973(b), concluding that “the prohibitions in the statute are aimed at

47. See *United States v. Dalmazzi*, 76 M.J. 1, 2 (C.A.A.F. 2016) (per curiam), *cert. granted*, No. 16-961, 2017 WL 468379 (U.S. Sept. 28, 2017).

48. *United States v. Al-Nashiri*, No. 14-001, slip op. at 3 (C.M.C.R. May 18, 2016) (mem.).

49. Indeed, this is also the rule dictated by the common-law doctrine of incompatibility. See *Lopez v. Martorell*, 59 F.2d 176, 178 (1st Cir. 1932) (“[A]n office holder was not ineligible to appointment or election to another incompatible office, but acceptance of the latter vacated the former. This rule is of great antiquity in the common law . . .”). See generally FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS §§ 419–431, at 267–76 (1890) (summarizing the origins, scope, and consequences of incompatible office holding at common law). And the current Defense Department regulation mandates the same result except under specific circumstances not presented in the CMCR cases; see also Dep't of Def., Directive 1344.10, Political Activities by Members of the Armed Forces § 4.6 (2008) [hereinafter DoD Directive 1344.10].

50. In *United States v. Dalmazzi*, 76 M.J. at 3, the court of appeals held that the defendant could not raise the objection because the judge at issue had not had his CMCR commission signed by the President at the time he participated in her CCA appeal—and so had not yet formally been appointed to the relevant “civil office.” This conclusion is belied by both the text of the civil office ban (which is triggered once a military officer holds *or* “exercise[s] the functions of, a civil office in the Government of the United States,” 10 U.S.C. § 973(b)(2)(A) (2012)), and the facts of *Dalmazzi*'s case, in which she filed a motion for reconsideration *after* the President had signed Judge Mitchell's commission.

51. 76 M.J. 189 (C.A.A.F. 2017), *cert. granted*, No. 16-1423, 2017 WL 2340498 (U.S. Sept. 28, 2017).

the holding of ‘civil office’ . . . rather than the performance of assigned military duty.”<sup>52</sup> Thus, although “[s]ection 973 might prohibit Judge Mitchell from holding office at the USCMCR . . . nothing in the text suggests that it prohibits Judge Mitchell from carrying out his assigned military duties at the CCA.”<sup>53</sup> This conclusion was bolstered, the court concluded, by the saving clause added by the 1983 amendments—and by the fact that the “current statute neither requires the retirement or discharge of a service member who occupies a prohibited civil office, nor operates to automatically effectuate such termination.”<sup>54</sup>

Finally, after a petition for certiorari was filed in *Ortiz*, the CMCR weighed back in on an interlocutory appeal in the 9/11 case, rejecting another challenge to the service of military judges. This time, the court ruled that for a series of reasons, including because, as in *Al-Nashiri*, CMCR judges don’t hold a “civil office,”<sup>55</sup> and that, in any event, Congress, in the CMCR’s view, *had* authorized military officers to serve as judges on the CMCR in 10 U.S.C. § 950f(b)(2).<sup>56</sup> A petition for mandamus to the D.C. Circuit challenging that ruling remains pending as of this writing.<sup>57</sup>

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There are numerous reasons to quibble with the conclusions reached by CAAF and the CMCR in the challenges to military officers serving as CMCR judges thus far. Among other things, none of the three rulings have disputed the central premise on which the claims depend—that Congress has not authorized military officers to serve as “additional” judges of the CMCR under 10 U.S.C. § 950f(b)(3). The CMCR’s conclusion that its judges don’t hold a civil office is simply impossible to square with the capacious understanding that term has been given (or the realities of the CMCR’s own workload). And CAAF’s focus on the 1983 amendments dramatically overreads their impact, suggesting that Congress completely upended the civil office ban (and all but denuded it of force).<sup>58</sup>

Indeed, CAAF’s interpretation of the 1983 amendments is internally incoherent: why would the saving clause have been necessary if, as CAAF concluded, the amendments eliminated the military officer’s termination as the remedy? And, perhaps most significantly, why would Congress have specifically provided, in the same section of the 1983 Act that revised § 973(b), that service on the Red River Compact Commission by an active-duty military officer “shall not terminate or

52. *Id.* at 192.

53. *Id.*

54. *Id.* As noted above, this analysis ignored the relevant Defense Department regulation, which *does* so require. See DoD Directive 1344.10, *supra* note 49. **Error! Bookmark not defined.**

55. See *United States v. Mohammad*, No. 17-002, slip op. at 5 (C.M.C.R. June 21, 2017).

56. See *id.* at 6.

57. Petition for a Writ of Mandamus and Prohibition, *In re Mohammad*, No. 17-1179 (D.C. Cir. filed July 21, 2017).

58. See, e.g., Petitioners’ Reply Brief at 5–10, *Dalmazzi v. United States*, No. 16-961 (U.S. filed May 19, 2017).

otherwise affect such officer's appointment as a military officer"?<sup>59</sup> None of the three opinions applying § 973(b) to CMCR judges squarely confront these questions, or explain why they are somehow irrelevant.<sup>60</sup>

But whatever else might be said about the flaws in the applications of § 973(b) to the CMCR thus far, what cannot be denied is the potential significance of having these interpretations left intact (or sustained on appeal). On CAAF's reading, the civil office ban is but a shadow of its former self. And the CMCR's interpretation gives it little more of an impact. For a statute protecting such an important constitutional norm, leaving these rulings intact would have obvious—and potentially monumental—consequences.

### III. MILITARY CONTROL OF CIVILIANS AND THE CIVIL OFFICE BAN

As for why such a specific set of legal questions is so relevant to a symposium on the future of the U.S. Constitution, it is worth reiterating that civilian control of the military—the principle that our armed forces will be subject to direct supervision by (and oversight from) elected, democratically accountable representatives—is one of the most venerated hallmarks of our constitutional system.<sup>61</sup> Indeed, one of the grievances leveled against King George III in the Declaration of Independence was that “[h]e has affected to render the Military independent of and superior to the Civil power.”<sup>62</sup> Thus, and in response, civilian control was enshrined in the Constitution's text,<sup>63</sup> it has become embedded in our popular culture, and it is routinely invoked as one of the most important (and seldom-tested) structural features of our system of government. As the Congressional Research Service concluded in January 2017, “[t]he fact that this principle has remained relatively unchallenged over the course of American history is, by most accounts, remarkable.”<sup>64</sup>

Just as important, but far less understood, is a closely related (but distinct) corollary to the civilian-control principle—the idea that the military generally should not exercise control over civilians. The civilian-control principle has, at its core, the mandate that the military follow orders from civilian leaders in carrying out traditional military functions. The military noncontrol principle, in contrast, is about keeping the military out of civilian *life* to the maximum possible extent. As Chief Justice Burger put it in 1972, there is:

[A] traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the Third Amendment's explicit

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59. See Department of Defense Authorization Act, 1984, Pub. L. No. 98-94, § 1002(d), 97 Stat. 614, 656 (1983); see also S. REP. NO. 98-174, at 258 (1983).

60. Nor does the government's brief in opposition in *Dalmazzi*. See Brief for the United States in Opposition, *Dalmazzi v. United States*, No. 16-961 (U.S. filed May 15, 2017).

61. See, e.g., *Greer v. Spock*, 424 U.S. 828, 839 (1976).

62. THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776).

63. U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . .”).

64. MCINNIS, *supra* note 2, at 1.

prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military.<sup>65</sup>

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65. *Laird v. Tatum*, 408 U.S. 1, 15 (1972).

The principle of military noncontrol also finds recognition in the Fifth Amendment's Grand Jury Indictment Clause, the exception to which extends only to those cases "arising in the land or naval forces,"<sup>66</sup> and which has been read to limit the circumstances in which the military may subject civilians to trial by court-martial.<sup>67</sup> But what the civil office ban helps to illustrate is that some of the most structurally significant enshrinements of the military noncontrol principle are statutory—including the Posse Comitatus Act, the civil office ban, and dozens of other statutes limiting the ability of military officers to hold specific offices and, in some cases, *requiring* that specific posts be held by civilians.<sup>68</sup>

But perhaps because it is often *conflated* with the civilian-control principle, the military noncontrol principle has been the focus of far less academic or judicial study, as such. What few discussions exist are invariably focused on individual applications of the principle (like the Posse Comitatus Act) rather than the principle itself. This paucity of scholarly or judicial attention might be defensible if the military noncontrol principle was as deeply enshrined as its more famous cousin, but, as the discussion in Part II suggests, it is not. Not only are many of the most important legal protections for military noncontrol *statutory*, but as the civil office ban litigation underscores, those statutes can be construed in a way that may sap them of much—if not most—of their strength.

Once these statutes are all properly understood as reflecting these deeper constitutional norms, that lends itself to three interrelated conclusions: First, discussions of the significance of civilian control of the military should both account for these largely neglected statutes and incorporate the extent to which some of the challenges documented herein have broader implications for that larger principle. Second, insofar as these statutes themselves are protecting deeper, transcendent constitutional norms, courts ought to be mindful of those norms when confronted with questions about these statutes' meaning and application—as in the CMCR cases documented above. Third, and going forward, Congress should take more seriously the significance of these statutes (and be warier of efforts to sidestep or dilute them), rather than legislating against the episode or political backdrop of the moment.

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For all of the discussion of the militarization of President Trump's Cabinet (and, now, with the appointment of General Kelly as his Chief of Staff, the White House), there's a constitutionally and optically meaningful difference between having *former* military officers serving in so many of these roles and having active-duty officers in such positions. But when all is said and done, the source of that line is neither constitutional tradition nor contemporary politics, but rather an old statute that has

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66. U.S. CONST. amend. V.

67. See Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933 (2015) (exploring recent examples in which military courts have been allowed to exercise jurisdiction over civilian offenses or offenders).

68. See, e.g., 10 U.S.C.A. § 942(b) (West 2010 & Supp. 2017) (requiring that CAAF judges be "appointed from civilian life").

largely been overlooked in even the most sophisticated discussions of civil-military relations. The civil office ban may not be the most exciting statutory manifestation of civilian control and military noncontrol, but it's one of the most important. That's why, far more than the composition of President Trump's inner circle, the CMCRL litigation is potentially such an important moment for the future of the U.S. Constitution—and the relationship between our civilian and military institutions thereunder.